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No. 08-275

Supreme Court, U.S.
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In The

Supreme Court of the United States

KIT LEE,

Petitioner,

v.

HUNTLEIGH HEALTHCARE, L.L.C., et al.,

Respondents.

On Petition For A Writ Of Certiorari To The Superior Court Of New Jersey Appellate Division

PETITION FOR REHEARING

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PETITION FOR REHEARING

The Respondents wasted precious judicial resources while are causing a less accurate, unlawful decision which was ironed out inconsistent with the major laws, New Jersey Law Against Discrimination (NJLAD), federal law, Age Discrimination in Employment Act (ADEA), Title VII Act, and conflict with huge of this Court's precedents. The Court of Appeals may not be affirmed the agency's unlawful decision by its request, "The reviewing court is obligated to affirm if there is any fair argument in support of the course taken by the agency." *Id.* The Court of Appeals must express a belief, based on reasoned and studied professional judgment, that this appeal involves a question of importance concerning the Congressional Purpose and Intent that Congress enacted the ADEA to eradicate the "inaccurate and stigmatizing stereotypes" that were causing older workers to be deprived of opportunities for employment, and that is the very essence of age discrimination. The ruling below is inconsistent which Congress passed; the ADEA eliminates any possible doubt on this score. The Petition for Rehearing should be granted.

STATEMENT OF THE CASE

The background: The Manufacturing Department was established in January 2002, started to make the health care products in August. It is fully operative since 2003 with two shifts, day-shift and

night shift; about a hundred production operators, Lee was hired in September 2003, she observed they are conscious in Manufacturing Dept. if you are over fifty years old, you must voluntary pick the Night-Shift, working hours from 5:30 pm to 2:30 am, especially Chinese or got hard time. If non-Chinese over fifty was allowed to stay at Day-Shift, the young ones could pick any shift for their interests, it is the unconscious bias, the average in age of Day Shift is 42; and average in age is 50.6 in Night Shift, that is replete with examples of stereotypical the older workers and unfavorable to them the treatment is discriminatory. After Petitioner's incident, respondent put more Chinese in day-shift.

Statement of the Fact: Lee was age 56, Chinese operator works at day-shift, during her pre-approved 10-day cruise, she got a termination, no return to work. Respondent recalled a 36-year-old, Indian co-worker back to work, and hired a 33-year-old, a Filipino to fill up her position, thereafter, five more inexperience operators were hired (Jasbir age: 29; Dioscaro age: 32, Medina age: 53; Carios age: 46; Nancy Yanet age: 32), the average in age: thirty-eight. All the evidences were in the records.

More findings: In discovery stages, to support her claim, Lee submitted more findings to the DCR that is the Respondent hired two Chinese operators on October 20, 2003; did not give full training twelve weeks to May Eng, age 62 and Joe Eng, age 65; to terminate, based on their age, on November 19, 2003, and their replacements are age: 39 Kaur Parveen,

Indian was born in 1965 – age: 39 – when she was hired on 1/5/04 to replace May Eng, Respondent erred to age: 44, and Vuong, Hoa Tu Vietnamese, age: 43 hired on 1/5/04 to replace Joe. Thereafter, totaling thirty-four operators were hired, average in age: 42-year-old. It has been proved by statistically with the hired list.

Petitioner relied on the four strands of evidences. These are set forth below, along with DCR's reasons for deciding that each was not probative of discrimination. *First*, Lee's replacement, Hannah Lao, a 33-year-old, Filipino as the first fourth element to fill up her position on September 26, 2005. *Second*, thereafter, her termination five more inexperience operators were hired: three 4th elements existed on October 24, 2005: Jasbir age: 29; Dioscaro age: 32, and Medina age: 53 (average age: 38). *Third*, two more 4th elements were hired on November 7, 2005: Carios age: 46; Nancy Yanet age: 32, the average in age: 37.5. *Fourth*, Lee relied on the evidence that she was treated less favorably than younger employees, i.e., Suiki, aged: 36-year-old, Indian, returned to work after two years, 730 days no-pay-leave, petitioner got no return, after her pre-approved 3-days. All evidences are in the record. Applying those findings, under the New Jersey Law Against Discrimination (NJLAD), it violated N.J.S.A. 10:5-4, N.J.S.A. 10:5-12(a).

Apply those findings to NJLAD, ADEA, and Title VII, the employee who feels he may have been discriminated against on the basis of age may appeal

to the Agency, who allows the employee to file in either the state or federal court system. As indicating by the Supreme Court to apply in the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), created a three-part framework for resolving intentional discrimination suits brought under Title VII of the Civil Rights Act of 1964. The first part of the framework requires the employee to establish a prima facie case which consists of four elements to show either direct or circumstantial evidence that age was the determining factor in the discharge by showing that he is a member of a protected class (40 or older), was qualified and performing well, was discharged though qualified and working well, and a significantly younger person was retained or treated more favorably (*U.S. Supreme Court 1996 in O'Connor v. Consolidated Coin Caterers,* 70 FEP 486, *Oxman v. WLS-TV*, 46 FEP 1392 (7th Circuit); *Kapossy v. McGraw-Hill*, 70 FEP 752 (New Jersey); and *Tuck v. Henkel Corp.*, 59 FEP 1199 (4th Circuit). In this case, Petitioner, a 56-year-old operator with good working performance ratings was discharged during her pre-approved 10-day cruise, while the 33-year-old Ms. Hannah Lao, new hired Filipino with inexperience, to fill up her position, she can demonstrate a prima facie case of age discrimination since she is older than 40, was discharged though qualified and working well, and her replacement is inexperience to fill up her position. Thereafter, five more operators were hired average in age is thirty-eight, and another significantly younger person, aged 36, Suiki retained to work after two years no-pay-leave, to treat more

favorably. All evidences are in the record. The judge in *Castle v. Sangamo Weston,* 46 FEP 139 (11th Circuit), found that, where the employer stated several individuals were discharged for various reasons including business reorganization, personality conflicts, poor job performance, the individual presented enough substantial evidence for a reasonable person to conclude they were a pretext for age discrimination. The main issue is that employees not in the protected age group were treated more favorably ... the lay off decision, and that a determining factor in the decision was age and discussed that the third prong of the prima facie discrimination could be established by showing that the employee was replaced by a substantially younger employee with inferior qualifications. It is said the ADEA was violated.

If the Petitioner succeeds in establishing her prima facie case, an inference of discrimination arises, and the burden of production shifts to the employer-defendant to come forward with a legitimate, nondiscriminatory reason for its actions see *McDonnell Douglas*, 411 U.S. at 802. Employer failed to produce "any" evidence to suffices to meet the prima facie case, employer comes forward with Sampson and Wayne both of them violated company's vacation policy got fired did not relate with this ageism case, See: *Williams v. General Motors Corp.*, 26 FEP 1381 (5th Circuit); *Castle v. Sangamo Weston,* 46 FEP 139 (11th Circuit); *Montana v. First Fed. S&L Assn.*, 49 FEP 269 (2nd Circuit), and *Oxman v.*

WLS-TV, 46 FEP 1392 (7th Circuit). (All the company consolidation cases, those teach us the pretexts).

At the third stage, the petitioner has a final opportunity to demonstrate that discriminatory animus, rather than the employer's reason is untrue, the more findings to be relevant to showing the pretext, i.e., her 3-paid-day-off application was destroyed to create misconduct pretext of "violated company's vacation policy." It was proved by the Labor Department Appeal Examiner Ms. Nancy Hunt during the Hearing for appeal unemployment benefit on 9/9/05 (App. 5 n-3, n-4) as direct evidence for pretext proof. Besides, accorded to the six fourth-prongs those appear in her prima facie case of ageism that will hold the "true" for the reason of "violated company's vacation policy" is merely a "Pretext" as circumstantial evidence for pretextual reasons. Likewise, the Fifth Circuit found, in *Thornbrough v. Columbus & GRR Co.*, 37 FEP 1414 (5th Circuit) that where the 56-year-old employee discharged during a reduction in force was clearly better qualified than the retained younger employee, it could reasonably conclude that the employer's stated reasons for the discharge were pretext. Another example, in *Oxman v. WLS-TV,* 46 FEP 1392 (7th Circuit), found that where a 60-year-old news bureau manager was terminated during a reduction in force and was not considered for two other vacancies for which he was qualified while younger employees were selected for these, the employer's stated business reasons were pretext. Likewise, in *Montana v. First Fed. Sav. &*

Loan Assn., 49 FEP 269 (2nd Circuit), found that where the 56-year-old employee, qualified and highest paid, was terminated in a reduction in force and a younger co-worker retained, and the older not considered for available transfers for which she was qualified, the employer's actions violated the ADEA. Likewise under the NJLAD and Title VII were said to be violated.

NJLAD, ADEA and Title VII Act got no respect: The DCR held that the respondent only hired additional individuals into the position of production operators after the date of termination. See *Zive v. Stanley Roberts*, 182 N.J. 436, 446 (2005), and blurred that genuine issue of material fact exists for the fourth elements in her establishing prima facie cases of ageism and racism, i.e. petitioner's aged thirty-three replacement, and five more new hired inexperienced operators, average age thirty-eight years old for pretextual reasons, and eliminated the petitioner was less favorably because she was a Chinese, age 56 to compare with an Indian, age 36; that is, to have eliminated the pretext analysis, putting those all up front in the prima facie showing of ageism and racism to dismiss the case with a final order of "a finding No Probable Cause." The agency apprehends the respective state judicial system; "it is always advantageous to make the first move" to enter the judgment to employer.

During the discovery stage: a motion of reconsideration the decision to the DCR, Petitioner submitted more findings to support her ageism and national

origin discrimination case as a precedent occurring one and half years ago, the employer discharged two Chinese operators, May Eng, age 62, and Joe Eng age 65, and dismissed based upon their age and national origin on November 19, 2003, and their replacements are age: 39 and age: 43, thereafter, their rejection, totaling thirty-four operators were hired, average in age: 42-year-old. It has been proved statistically with the hired list after their termination. All the evidences were in the records. [T63, 63a-d] That evidence is during the discovery stage, and the employer did not respond, proof by DAG, Mr. Brian Lipman, during the discovery stage if the employer kept silent, no response the supporting evidence, the judgment must enter to Petitioner, the DCR did not admit the errors – against the major laws, and then petitioner has to run for the Appeal to the Superior Court Appellate Division.

The Court of Appeals correctly applies of all of the evidences concluding that petitioner proved a prima facie case, erred in holding that petitioner had not evidence proof in rebuttal by showing that its stated reason for a pretext. And the employer violated the New Jersey Wage Payment Law by holding payment – unlawful employment discrimination N.J.S.A. 10:5-12(a), likewise opposed her unemployment benefit by elimination the second application, it is prohibited by the LAD, and more finding in the two Chinese older co-workers were terminated as a precedent. If the Judge so finds, he must order a prompt and appropriate remedy. In the absence of such

findings, the judgment should be reversed and remanded to the petitioner. Based on those findings, the Court of Appeals to determine whether to overturn the decision.

Respondents of conducted the Court of Appeals: "The DCR's Finding of No Probable Cause is a final agency order. As such, the finding of No Probable Cause is appealable to this Court. *Prado v. State of New Jersey*, 186 N.J. 413, 422 (2006) (the Appellate Division is vested with exclusive jurisdiction over all final decisions of state administrative agencies). The scope of judicial review of a final agency order is limited. *In re Taylor*, 158 N.J. 644, 656 (1999) ... 'The agency's determination must not be overturned in the absence of showing that it was arbitrary, capricious or unreasonable, or that it lacked fair support in the evidence, or that it violated legislative policies.' *E.g. Campbell v. Department of Civil Service*, 39 N.J. 556, 562 (1963)." *Id.* Then respondent of DCR continued: "It is not the function of the courts to substitute their independent judgment or the facts for that of an administrative agency. The Court will usually not review the evidence, determine the credibility of witnesses, draw inferences and conclusions from the evidence or resolve conflicts therein. The reviewing court is obligated to affirm if there is any fair argument in support of the course taken by the agency...." *Id.*

"It is always advantageous to make the first move," the agency won. The Court of Appeals claimed: "[C]ourts are not free to substitute their

judgment as to the wisdom of a particular administrative action for that of the agency so long as that action is statutorily authorized and not otherwise defective because arbitrary or unreasonable...." *Id.* (App. 6-7) The Judge felt painful for the agency's professional advices. The Court of Appeals denied the motion presented the case to the Supreme Court of New Jersey. The Supreme Court duly submitted the case for this Court's action.

Under the New Jersey Law Against Discrimination the law said to be violated, in page eight as above. Petitioner testified her case in the federal judicial system, under ADEA and Title VII; employer was said to violate discriminatory discharge in ADEA. The Age Discrimination Employment Act is intended "to promote employment of older persons based on their ability rather than age." 29 U.S.C. §621(b). §623(a)(1) of the ADEA prohibits discrimination "against any individual ... because of such individual's age." Like Title VII legislation, it applies to individuals. The rule and the major laws, ADEA, LAD, Title VII Act, laid down by the agency's decision is fraught with unanticipated consequences that will adversely affect a wide range of employment decisions and reshape the conduct of even conventional age discrimination litigation. Review is warranted to forestall the burdensome effects unleashed by the agency's distortion of Congress's purpose. This Court's mercy, this Court's commitment, the Petition for Rehearing should be granted.

THE REASON OF PETITION FOR REHEARING

No matter from what angle of the State Law, NJLAD, the Federal Laws, ADEA, and Title VII Act, this case was analyzed, everything kept circling back to the question that this appeal was involved – a question of importance concerning the Congressional Purpose and Intent that the Congressional findings emphasize that ADEA was intended to address the difficulty that age discrimination poses for "older workers" and "older persons," who face disproportionately high rates of unemployment due to the persistence of discriminatory, age-based stereotypes about their competence. ADEA §2(a)(1)-(3), 29 U.S.C. §621(a)(1)-(3); see *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993); *EEOC v. Wyoming*, 460 U.S. 226, 230-31 (1983). Congress found that those stereotypes led employers to set "arbitrary age limits," which "work to the disadvantage of older persons" who are seeking "to retain employment, and especially to regain employment when displaced from jobs."

These findings, the product of extensive inquiry by Congress and, at its direction, by the Secretary of Labor, see *EEOC v. Wyoming*, 460 U.S. at 230-31, underscore the precision with which Congress focused on the disadvantages that older workers face "relative to the younger ages." The court of appeals is impossible to reconcile with Congress's purpose in enacting the Act to affirm the agency's discretion decision repeatedly, in this case, petitioner, age 56, was fired

and replaced by a 33-year-old replacement, five more operators were hired thereafter, average age thirty-eight, and retained age 36 co-worker.

Comparisons within this Court's precedent in *O'Connor v. Consolidated Coin Caterers,* 70 FEP 486, 56 F.3d 542, reversed (1996) O'Connor at age 56 was fired, filed his suit under the ADEA. The Fourth Circuit found he failed to make out a prima facie case of discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792; because he failed to show that he was replaced by someone outside the protected age group by the ADEA, his replacement exactly is age 40. This Court observed: "The fact that one person in the PAG has lost out to another person in the PAG, so long as he has lost out because of his age;" "evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion," 116 S.Ct. at 1310, *Teamsters v. United States*, 431 U.S. 324, 358 (1977), O'Connor's case was reversed and remanded.

Petitioner was made out an ageism case with fully credit without indisputable; her case was dismissed with a final order of finding no probable cause, the Court of Appeals claimed being not free to substitute the judgment of an agency....As this Court's decisions in *Hazen Paper* and *O'Connor* indicate, analysis of the statute as an integrated whole makes clear that the ADEA focuses on remedying discrimination against *older* workers arbitrarily based on their age. Thus, the statement of purpose that Congress wrote into the ADEA makes clear that it was

intended to benefit older workers. The legislative history and the backdrop against which Congress passed the Act eliminate any possible doubt on this score. Consideration of each of these sources compels the conclusion that the court of appeals misconstrued the statute and contravened the congressional purpose that underlies the ADEA. The Petition for Rehearing must be granted.

CONCLUSION

For the foregoing reasons, Petitioner respectfully asks this Court to grant the Petition for Rehearing.

Respectfully submitted,

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CERTIFICATION OF COUNSEL

Pursuant to Rule 44(2), the undersigned hereby certifies that this Petition for Rehearing is brought in good faith and not interposed for the purpose of delay.

I herby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

Respectfully submitted,

_____

KIT LEE Pro Se as Attorney

Dated: November 26, 2008.